Supreme Court, U.S.
FILED

97 • 434 SEP - 5 1997

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

DAVID L. SMITH,

Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO, UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT,

Respondents.

On Petition for Writ of Certiorari to the United States District Court for the District of Colorado and the United States Court of Appeals for the Tenth Circuit

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PETITION FOR WRIT OF CERTIORARI

DAVID L. SMITH

1630 Welton Street, Suite 300
Denver, Colorado 80202
(303) 534-0153

PRO SE ATTORNEY-PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

Whether because the disciplinary sanctions imposed against Mr. Smith were "punitive, to vindicate the authority of the court," rather than "remedial, and for the benefit of the complainant," they were criminal rather than civil in nature.

Whether Mr. Smith was therefore entitled to a full criminal process (including his Sixth Amendment right to a jury trial) before being convicted and punished by the Tenth Circuit, the District Court and their disciplinary panels.

Whether as a matter of equal protection of the laws, Mr. Smith should not have fewer constitutional rights merely because he was convicted and punished in attorney disciplinary proceedings rather than in criminal contempt proceedings.

Whether at the very least, Mr. Smith was entitled to fair notice of the charges being brought against him and an adequate opportunity to be heard with respect to those charges before entry of a final judgment.

Whether despite Mr. Smith's request to be heard in person in defense and

mitigation, and for a hearing, at which he would have the opportunity to present expert testimony and other relevant evidence, the Tenth Circuit disciplinary panel limited his opportunity to be heard to his verified response to its order to show cause--a blatant and egregious violation of Fed. R. App. P. 46.

Whether by refusing to grant Mr. Smith's request for the evidentiary hearing required by Fed. R. App. P. 46, and by convicting him for practicing law in the Tenth Circuit "without authorization"--an alleged offense not charged in its order to show cause--the Tenth Circuit disciplinary panel deprived him of his Fifth Amendment due process right to fair notice of the charges being brought against him and an adequate opportunity to be heard with respect to those charges before entry of a final judgment.

Whether by convicting Mr. Smith for "(1) writing briefs on behalf of third parties while under indefinite suspension, and (2) for violating this court's November 29, 1993 order"--charges which were based on the same conduct for which he had previously been acquitted on the charge of "ghost-writing" the briefs in question--the Tenth Circuit disciplinary panel twice put him "in jeopardy of life or limb" for the same

offense, in violation of the Fifth Amendment to the Constitution of the United States.

Whether Mr. Smith was entitled to have his case heard and decided by a fair and impartial decisionmaker.

Whether as evidenced by its (November 29, 1993) order imposing harsh and unjustified discipline against Mr. Smith without giving him a full criminal process (including his Sixth Amendment right to a jury trial), or at the very least, fair notice of the charges being brought against him and an adequate opportunity to be heard with respect to those charges before entry of a final judgment, the Tenth Circuit disciplinary panel's fairness and impartiality might reasonably be questioned.

Whether the Tenth Circuit disciplinary panel was therefore obligated by 28 U.S.C. § 455(a) and Canon 3 of the ABA Code of Judicial Conduct to disqualify itself from the attorney disciplinary proceedings against Mr. Smith.

Whether by failing or refusing to disqualify itself from the disciplinary proceedings against Mr. Smith, the Tenth Circuit disciplinary panel deprived him

of his Fifth Amendment due process right to have his case heard and decided by a fair and impartial decisionmaker.

Whether by refusing to address Mr. Smith's complaints of judicial misconduct pursuant to 28 U.S.C. § 372(c), the Tenth Circuit disciplinary panel grossly abused its discretion or otherwise acted improperly or in a manner detrimental to the fair and impartial administration of justice.

Whether Mr. Smith was entitled to effective review of the validity of the Tenth Circuit disciplinary panel's (November 29, 1993) suspension order before being convicted and punished for allegedly violating this order.

Whether Mr. Smith was also entitled to effective review of the validity of the disciplinary sanctions imposed against him by the Tenth Circuit disciplinary panel.

Whether by arbitrarily refusing to provide effective review of the validity of the Tenth Circuit disciplinary panel's (November 29, 1993) suspension order before convicting and punishing Mr. Smith for allegedly violating this order, and by arbitrarily refusing to provide effective review of the validity of the

disciplinary sanctions imposed against him by the Tenth Circuit disciplinary panel, the Tenth Circuit deprived him of his Fifth Amendment right to due process of law.

Whether in order to punish Mr. Smith for allegedly violating its (November 29, 1993) suspension order and practicing law in the Tenth Circuit "without authorization," the Tenth Circuit disciplinary panel was required to prove beyond a reasonable doubt that Mr. Smith entered his appearance on behalf of his clients in the appeals in question or otherwise held himself out as an attorney entitled to practice law in the Tenth Circuit.

Whether in the absence of proof beyond a reasonable doubt that he entered his appearance on behalf of his clients in the appeals in question or otherwise held himself out as an attorney entitled to practice law in the Tenth Circuit, Mr. Smith should not have been convicted for violating the Tenth Circuit disciplinary panel's (November 29, 1993) suspension order and practicing law in the Tenth Circuit "without authorization."

Whether by ignoring these and the other defenses raised by Mr. Smith in his response to its order to show cause, the Tenth Circuit disciplinary panel deprived

him of his Fifth Amendment due process right to present a defense to the charges being brought against him.

Whether the discipline imposed against Mr. Smith by the Tenth Circuit disciplinary panel is so excessive and so disproportionate in comparison to the seriousness of any misconduct committed by him as to amount to Eighth Amendment "cruel and unusual" punishment.

Whether by disciplining Mr. Smith for writing briefs and otherwise assisting his clients with their appeals from the District Court to the Tenth Circuit, the Tenth Circuit disciplinary panel punished him for engaging in activities protected by his and his clients' First Amendment right to freedom of speech and association, and to petition the government for a redress of grievances.

Whether this was especially true for Mr. Smith's clients, who were incompetent to proceed pro se, and were financially unable to hire substitute counsel to replace Mr. Smith, who was pursuing their federal civil rights cases on a contingent fee basis before he was disbarred from the practice of law in the Tenth Circuit without being afforded a due process evidentiary hearing.

Whether Mr. Smith is the victim of the current "professionalism crusade," in which "heretical lawyers" who commit themselves to roles other than "officer of the court" are hunted down, brought before the Inquisition and burned at the stake, even though "officer of the court" is not the only legitimate, or even the most traditional, role to which lawyers may commit themselves.

Whether because the Tenth Circuit disciplinary panel has convicted and punished Mr. Smith for fulfilling his ethical obligation to his clients to be a zealous advocate of their civil rights interests within the bounds of the law, the misconduct proved against him (if any) warrants that a substantially different form of discipline (including no discipline) be imposed.

Whether by issuing her (February 18, 1997) order denying Mr. Smith's petition for writ of habeas corpus, and motion to vacate, set aside or correct sentence without granting a hearing or considering the issues raised and argued by him therein, Chief Tenth Circuit Judge Seymour has deprived him of his Fifth Amendment due process right to a full and fair opportunity (or any opportunity) to litigate the constitutional validity of the Tenth Circuit disciplinary panel's

(November 29, 1993) suspension order and its (February 13, 1996) order of disbarment.

Whether by issuing their (May 8, 1997) order denying Mr. Smith's petition for writ of mandamus or prohibition with respect to the letter refusal by the Clerk and Chief Deputy Clerk of the Tenth Circuit to accept for filing his notice of appeal of Chief Tenth Circuit Judge Seymour's (February 18, 1997) order without considering the issues raised and argued by him therein, Tenth Circuit Judges Ebel and Briscoe have deprived him of his statutory right to appeal this order to the Tenth Circuit.

Whether the judges of the Tenth Circuit have not only demonstrated further their bias and prejudice against Mr. Smith, in violation of his Fifth Amendment due process right to a fair and impartial decisionmaker; they have suspended the privilege of the Writ of Habeas Corpus, in violation of Article I, Section 9 of the Constitution of the United States.

Whether by issuing its (February 10, 1995) suspension order, its (April 26, 1996) order of disbarment, and its (May 2, 1996) order admonishing Mr. Smith and threatening to cite him for contempt of court "if he continues to practice law in

this District," and by imposing harsh and unjustified disciplinary sanctions against him without granting his requests for an evidentiary hearing, the judges of the District Court disciplinary panel have rubber-stamped the unlawful orders, judgments and proceedings of the Tenth Circuit and its disciplinary panel, in violation of his Fifth Amendment right to due process of law.

Whether the judges of the District Court disciplinary panel have also engaged in a pattern of judicial misconduct, in violation of Canon 3 of the ABA Code of Judicial Conduct and 28 U.S.C. § 372(c).

Whether by issuing its (May 16, 1997) order denying Mr. Smith's appeal of the District Court disciplinary panel's (April 26, 1996) order of disbarment and its (May 2, 1996) order admonishing Mr. Smith and threatening to cite him for contempt of court without considering the issues raised and argued by him in his appellate brief, and by issuing its (June 13, 1997) order denying Mr. Smith's petition for rehearing and suggestion for rehearing en banc of its (May 16, 1997) order, and denying his complaint of judicial misconduct, without considering the issues raised and argued by him therein, the judges of the Tenth Circuit have deprived Mr. Smith of his First

Amendment right to petition the government for a redress of grievances and his Fifth Amendment right to due process of law, including his statutory right to appeal a final decision of a district court.

Whether the judges of the Tenth Circuit have also engaged in a pattern of judicial misconduct, in violation of Canon 3 of the ABA Code of Judicial Conduct and 28 U.S.C. § 372(c).

Whether the Tenth Circuit and its disciplinary panel have so far departed from the accepted and usual course of judicial proceedings, or have sanctioned such a departure by the District Court and its disciplinary panel, as to call for an exercise of this Court's supervisory power.

Whether the Tenth Circuit, the District Court and their disciplinary panels have decided important questions of federal law that have not been, but should be, settled by this Court.

Whether the Tenth Circuit, the District Court and their disciplinary panels have decided important federal questions in a way that conflicts with relevant decisions in this Court.

Whether the Tenth Circuit disciplinary panel's (November 29, 1993) suspension order, its (February 13, 1996) order of disbarment, the District Court disciplinary panel's (February 10, 1995) suspension order, its (April 26, 1996) order of disbarment, and its (May 2, 1996) order admonishing Mr. Smith and threatening to cite him for contempt of court "if he continues to practice law in this District" were void ab initio.

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IN THE MATTER OF DAVID L. SMITH, Disciplinary Action No. 93-DP-28 (District of Colorado Disciplinary Panel) (Suspension Order Filed on February 10, 1995).

In re David L. Smith, 76 F.3d 335 (10th Circuit Disciplinary Panel) (Order of Disbarment Filed on February 13, 1996), cert. denied, ____ U.S. ____, 117 S.Ct. 186, ____ L.Ed.2d ____ (1996).

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In re David L. Smith, No. 93-631 (10th Circuit Chief Judge Seymour) (Order Filed on February 18, 1997).

In re David L. Smith, No. 97-1127 (10th Circuit Judges Ebel and Briscoe) (Order Filed on May 8, 1997).

IN THE MATTER OF DAVID L. SMITH, Nos. 96-1254 and 96-1256 (10th Cir.) (Order and Judgment Filed on May 16, 1997).

IN THE MATTER OF DAVID L. SMITH, Nos. 96-1254 and 96-1256 (10th Cir.) (Order Entered on June 13, 1997.

JURISDICTION

The opinions and orders sought to be reviewed were entered on November 29, 1993, February 10, 1995, February 13, 1996, February 16, 1996, April 26, 1996, May 2, 1996, February 18, 1997, May 8, 1997 and May 16, 1997. Rehearing of the Tenth Circuit disciplinary panel's (November 29, 1993) suspension order was denied by order dated January 3, 1994. Mr. Smith's motion to vacate the Tenth Circuit disciplinary panel's (November 29, 1993) suspension order was denied by order dated July 18, 1995. Mr. Smith's petition for rehearing and suggestion for rehearing en banc (filed on August 1, 1995) of the Tenth Circuit disciplinary panel's (July 18, 1995) order is still pending before the Tenth Circuit and its disciplinary panel. Rehearing of the Tenth Circuit disciplinary panel's (February 13, 1996) order of disbarment was denied by order dated March 25, 1996. Rehearing of the Tenth Circuit's (February 16, 1996) order affirming the District Court disciplinary panel's (February 10, 1995) suspension order was denied by order dated April 2, 1996. Mr. Smith's petition for writ of habeas corpus, and motion to vacate, set aside or correct sentence with respect to the Tenth Circuit disciplinary panel's (November 29, 1993) suspension order and

its (February 13, 1996) order of disbarment was denied by order dated February 18, 1997. Mr. Smith's petition for writ of mandamus or prohibition with respect to the letter refusal by Patrick Fisher, Clerk of the United States Court of Appeals for the Tenth Circuit, and Elisabeth A. Shumaker, Chief Deputy Clerk, to accept for filing his notice of appeal of Chief Tenth Circuit Judge Seymour's (February 18, 1997) order was denied by order dated May 8, 1997. Rehearing of the Tenth Circuit's (May 16, 1997) order affirming the District Court disciplinary panel's (April 26, 1996) order of disbarment and its (May 2, 1996) order admonishing Mr. Smith and threatening to cite him for contempt of court was denied by order dated June 13, 1997.

The statutory provision believed to confer jurisdiction on the Supreme Court of the United States to review on writ of certiorari the opinions and orders in question is 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

Art. I, Sec. 9, U.S. Consti.

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Amend. 5, U.S. Consti.

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Section 8.1 of the Plan for Attorney Disciplinary Enforcement for the United States Court of Appeals for the Tenth Circuit

Canon 3, ABA Code of Judicial Conduct

See the Appendix hereto for the full text of the pertinent portions of the constitutional provisions and statues involved in the case.

Pro se attorney-petitioner David L. Smith ("Mr. Smith") hereby files his petition for writ of certiorari to the United States District Court for the District of Colorado and the United States Court of Appeals for the Tenth Circuit:

I. STATEMENT OF THE CASE

On November 29, 1993, the three-judge disciplinary panel of the United States Court of Appeals for the Tenth Circuit (composed of Seymour, Chief Judge, and Baldock and Brorby, Circuit Judges) issued its order indefinitely suspending Mr. Smith from the practice of law in the Tenth Circuit for filing alleged "frivolous" appeals of sanction orders issued by the United States District Court for the District of Colorado to the Tenth Circuit in four federal civil rights cases, and for his failure to comply with court orders to pay harsh and unjustified sanctions of more than $50,000.00 previously imposed against him by the Tenth Circuit and the United States District Court for the District of Colorado. See In re David L. Smith, 10 F.3d 723 (10th Cir.), cert. denied, 513 U.S. 807, 115 S.Ct. 53, 130 L.Ed.2d 13 (1994). Mr. Smith may apply for reinstatement to the Tenth Circuit bar when he can demonstrate that each sanction order of the Tenth Circuit and the U.S. District Court has been "satisfied."

On January 3, 1994, the Tenth Circuit and its disciplinary panel issued their order denying Mr. Smith's petition for rehearing and suggestion for rehearing en banc of the Tenth Circuit disciplinary panel's (November 29, 1993) suspension order without considering the issues raised and argued by him therein.

On February 10, 1995, the three-judge disciplinary panel of the United States District Court for the District of Colorado (composed of Weinshienk, Nottingham and Sparr, District Judges) issued its order suspending Mr. Smith indefinitely from the practice of law in the District Court based on the Tenth Circuit disciplinary panel's (November 29, 1993) suspension order.

On July 18, 1995, the Tenth Circuit disciplinary panel denied Mr. Smith's motion to vacate its (November 29, 1993) suspension order without considering the issues raised and argued by him therein. Mr. Smith's petition for rehearing and suggestion for rehearing en banc (filed on August 1, 1995) of the Tenth Circuit disciplinary panel's (July 18, 1995) order is still pending before the Tenth Circuit and its disciplinary panel.

On February 13, 1996, the Tenth Circuit disciplinary panel issued its order disbarring Mr. Smith from the

practice of law in the Tenth Circuit. See In re David L. Smith, 76 F.3d 335 (10th Cir.), cert. denied, ____ U.S. ____, 117 S.Ct. 186, ____ L.Ed.2d ____ (1996). The Tenth Circuit disciplinary panel disbarred Mr. Smith for allegedly practicing law in the Tenth Circuit in violation of its (November 29, 1993) suspension order, and for allegedly practicing law in the Tenth Circuit "without authorization."

On February 16, 1996, the Tenth Circuit issued its order denying Mr. Smith's appeal of the District Court disciplinary panel's (February 10, 1995) suspension order without considering the issues raised and argued by him in his appellate brief.

On March 25, 1996, the Tenth Circuit and its disciplinary panel issued their order denying Mr. Smith's petition for rehearing, motion for emergency stay of suspension and disbarment orders pending resolution of petition for rehearing, and suggestion for rehearing en banc with respect to the Tenth Circuit disciplinary panel's (November 29, 1993) suspension order and its (February 13, 1996) order of disbarment without considering the issues raised and argued by him therein.

On April 2, 1996, the Tenth Circuit issued its order denying Mr. Smith's

petition for rehearing and suggestion for rehearing en banc of its (February 16, 1996) order affirming the District Court disciplinary panel's (February 10, 1995) suspension order without considering the issues raised and argued by him therein.

On April 26, 1996, the District Court disciplinary panel issued its order of disbarment disbarring Mr. Smith from the practice of law in the District Court based on the Tenth Circuit disciplinary panel's (February 13, 1996) order of disbarment.

On May 2, 1996, the District Court disciplinary panel issued its order admonishing Mr. Smith for allegedly practicing law in the District Court in violation of its (February 10, 1995) suspension order, and threatening to cite him for contempt of court "if he continues to practice law in this District."

On February 18, 1997, Chief Tenth Circuit Judge Seymour issued her order denying Mr. Smith's petition for writ of habeas corpus, and motion to vacate, set aside or correct sentence with respect to the Tenth Circuit disciplinary panel's (November 29, 1993) suspension order and its (February 13, 1996) order of disbarment without granting a hearing or

considering the issues raised and argued by him therein.

On May 8, 1997, Tenth Circuit Judges Ebel and Briscoe issued their order denying Mr. Smith's petition for writ of mandamus or prohibition with respect to the letter refusal by Patrick Fisher, Clerk of the Tenth Circuit, and Elisabeth A. Shumaker, Chief Deputy Clerk, to accept for filing his notice of appeal of Chief Tenth Circuit Judge Seymour's (February 18, 1997) order without considering the issues raised and argued by him therein.

On May 16, 1997, the Tenth Circuit issued its order denying Mr. Smith's appeal of the District Court disciplinary panel's (April 26, 1996) order of disbarment and its (May 2, 1996) order admonishing Mr. Smith and threatening to cite him for contempt of court without considering the issues raised and argued by him in his appellate brief.

On June 13, 1997, the Tenth Circuit issued its order denying Mr. Smith's petition for rehearing and suggestion for rehearing en banc of its (May 16, 1997) order, and denying his complaint of judicial misconduct, without considering the issues raised and argued by him therein.

II. ARGUMENT

Because the disciplinary sanctions imposed against Mr. Smith were "punitive, to vindicate the authority of the court," rather than "remedial, and for the benefit of the complainant," they were criminal rather than civil in nature. See International Union v. Bagwell, 512 U.S. 821, 114 S.Ct. 2552, 2557, 129 L.Ed.2d 642 (1994), quoting Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 441, 31 S.Ct. 492, 498, 55 L.Ed. 797 (1911); see also In re Ruffalo, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968) (attorney disciplinary proceedings are quasi-criminal in nature). Mr. Smith was therefore entitled to a full criminal process (including his Sixth Amendment right to a jury trial) before being convicted and punished by the Tenth Circuit, the District Court and their disciplinary panels. See International Union v. Bagwell, 512 U.S. 821, 114 S.Ct. 2552, 2560, 129 L.Ed.2d 642 (1994), citing Cooke v. United States, 267 U.S. 517, 534, 45 S.Ct. 390, 394, 69 L.Ed. 767 (1925), and Hicks v. Feiock, 485 U.S. 624, 632, 108 S.Ct. 1423, 1429, 99 L.Ed.2d 721 (1988); see also Bloom v. Illinois, 391 U.S. 194, 88 S.Ct. 1477, 20 L.Ed.2d 522 (1968). Further, as a matter of equal protection of the laws, Mr. Smith should not have fewer constitutional rights merely because he

was convicted and punished in attorney disciplinary proceedings rather than in criminal contempt proceedings.

At the very least, Mr. Smith was entitled to fair notice of the charges being brought against him and an adequate opportunity to be heard with respect to those charges before entry of a final judgment. See In re Ruffalo, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968); Wolff v. McDonnell, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974); Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); Cleveland Board of Education v. Loudermill, 470 U.S. 494, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985); Razatos v. Colorado Supreme Court, 746 F.2d 1429 (10th Cir. 1984), cert. denied, 471 U.S. 1016 (1985); Mattox v. Disciplinary Panel of the United States District Court for the District of Colorado, 758 F.2d 1362 (10th Cir. 1985). However, despite Mr. Smith's request to be heard in person in defense and mitigation, and for a hearing, at which he would have the opportunity to present expert testimony and other relevant evidence,[1] the Tenth

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[1]In his response to the Tenth Circuit disciplinary panel's order to show cause, Mr. Smith requested to be heard in person in defense and mitigation pursuant to Section 8.1 of the Plan for

Circuit disciplinary panel limited his opportunity to be heard to his verified response to its order to show cause--a blatant and egregious violation of Fed. R. App. P. 46, which provides in pertinent part as follows:

> (b) Suspension or Disbarment.--When it is shown to the court that any member of its bar has been suspended or disbarred from practice in any other court of record, or has been guilty of conduct unbecoming a member of the bar of the court, the member will be subject to suspension or disbarment by the court. The member shall be afforded an opportunity to show good cause, within such time as the court shall prescribe, why the member should not be suspended or disbarred. Upon the member's response to the rule to show cause, and after hearing, if requested, or upon expiration of the time prescribed for a response if no response is made, the court shall enter an appropriate order.

Attorney Disciplinary Enforcement and Fed. R. App. P. 46(c). Mr. Smith specifically requested an evidentiary hearing at which he would have the opportunity to present expert testimony and other relevant evidence.

> (c) Disciplinary Power of the Court Over Attorneys.--A court of appeals may, after reasonable notice and an opportunity to show cause to the contrary, and after hearing, if requested, take any appropriate disciplinary action against any attorney who practices before it for conduct unbecoming a member of the bar or for failure to comply with these rules or any rule of the court.
>
> [Emphasis added.]

See also Canon 3 of the ABA Code of Judicial Conduct, which provides that "[a] judge should accord to every person who is legally interested in a proceeding, or his or her lawyer, full right to be heard according to law." By refusing to grant Mr. Smith's request for the evidentiary hearing required by Fed. R. App. P. 46, and by convicting him for practicing law in the Tenth Circuit "without authorization"--an alleged offense not charged in its order to show cause--the Tenth Circuit disciplinary panel deprived him of his Fifth Amendment due process right to fair notice of the charges being brought against him and an adequate opportunity to be heard with respect to those charges before entry of a final judgment.

Initially, the Tenth Circuit disciplinary panel ordered Mr. Smith to show cause in writing why he should not be disciplined for "ghost-writing" the briefs in question. However, when Mr. Smith filed his verified response stating that he had never participated in the writing of a brief for a pro se litigant without disclosing his participation, and had never refused to sign a brief that he had written when requested to do so by any court, the Tenth Circuit disciplinary panel acquitted him on the charge of "ghost-writing" the briefs in question, but ordered him to show cause in writing why he should not be disbarred for "(1) writing briefs on behalf of third parties while under indefinite suspension, and (2) for violating this court's November 29, 1993 order." By convicting Mr. Smith on these charges, which were based on the same conduct for which he had previously been acquitted on the charge of "ghost-writing" the briefs in question, the Tenth Circuit disciplinary panel twice put him "in jeopardy of life or limb" for the same offense, in violation of the Fifth Amendment to the Constitution of the United States.

Mr. Smith was entitled to have his case heard and decided by a fair and impartial decisionmaker. See Arnett v. Kennedy, 416 U.S. 134, 197, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974) (White, J.,

concurring in part and dissenting in part) ("the right to an impartial decision-maker is required by due process" in every case); Morrissey v. Brewer, 408 U.S. 471, 485-86, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) (decisionmaker bias is grounds for reversal); Mayberry v. Pennsylvania, 400 U.S. 455, 469, 91 S.Ct. 499, 27 L.Ed.2d 532 (1971) (Harlan, J., concurring) ("the appearance of evenhanded justice . . . is at the core of due process"); Goldberg v. Kelly, 397 U.S. 254, 271, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970) (decisionmaker bias is grounds for reversal); Offut v. United States, 348 U.S. 11, 75 S.Ct. 11, 99 L.Ed. 11 (1954) (nor may a judge or other ostensibly impartial decisionmaker "give vent to personal spleen or respond to a personal grievance" in reaching a decision). However, as evidenced by its (November 29, 1993) order imposing harsh and unjustified discipline against Mr. Smith without affording him a full criminal process (including his Sixth Amendment right to a jury trial), or at the very least, fair notice of the charges being brought against him and an adequate opportunity to be heard with respect to those charges before entry of a final judgment, the Tenth Circuit disciplinary panel's fairness and impartiality might reasonably be questioned. Id. The Tenth Circuit disciplinary panel was therefore

obligated to disqualify itself from the attorney disciplinary proceedings against Mr. Smith. See 28 U.S.C. § 455(a), which provides that "[a]ny justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned," and Canon 3 of the ABA Code of Judicial Conduct, which provides that "[a] judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." See also Liteky v. United States, 510 U.S. 540, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994). By failing or refusing to disqualify itself from the disciplinary proceedings against Mr. Smith, the Tenth Circuit disciplinary panel deprived him of his Fifth Amendment due process right to have his case heard and decided by a fair and impartial decisionmaker. Further, by refusing to address Mr. Smith's complaints of judicial misconduct pursuant to 28 U.S.C. § 372(c), the Tenth Circuit disciplinary panel grossly abused its discretion or otherwise acted improperly or in a manner detrimental to the fair and impartial administration of justice.

Mr. Smith was entitled to effective review of the validity of the Tenth Circuit disciplinary panel's (November 29, 1993) suspension order before being convicted and punished for allegedly

violating this order.[2] See Walker v. City of Birmingham, 388 U.S. 307, 318-20,

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[2]The Tenth Circuit disciplinary panel's (November 29, 1993) suspension order was transparently invalid. In at least one of the cases underlying this order, Casillan v. RTD, et al., a three-judge hearing panel of the Tenth Circuit issued its unpublished order imposing harsh and unjustified sanctions against Mr. Smith for filing an alleged "frivolous" appeal without giving him prior notice that sanctions were being considered or an adequate opportunity (or any opportunity) to file a brief or otherwise respond before sanctions were imposed, in violation of his Fifth Amendment right to due process of law. Further, the Tenth Circuit disciplinary panel refused to permit Mr. Smith to argue that his appeals of District Court sanction orders were not "frivolous," holding that this issue was foreclosed by "circuit precedent," a reference to previous unpublished orders imposing harsh and unjustified sanctions against Mr. Smith. However, this refusal was not only contrary to 10th Cir. R. 36.3., which provides that "[u]npublished opinions and orders and judgments of this court have no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for

purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel." [Emphasis added.] This refusal also prevented Mr. Smith from arguing that because there was a split in the federal circuits on the issues involved in his appeals, or because his appeals were good faith arguments for the extension, modification or reversal of existing law, or for the establishment of new law, the Tenth Circuit's unpublished orders sanctioning him for filing these appeals were void ab initio. See McKnight v. General Motors Corporation, 511 U.S. 659, 114 S.Ct. 1826, 128 L.Ed.2d 655 (1994) (appeal not "frivolous" where the only basis for the order imposing sanctions on petitioner's attorney was that his argument was foreclosed by circuit precedent). Finally, this refusal created an irrebuttable presumption of guilt that deprived Mr. Smith of his Fifth Amendment right to due process of law. Under these circumstances, Mr. Smith did not have a full and fair opportunity to litigate the issue of whether he had filed "frivolous" appeals in the underlying cases cited in the order to show cause, and the Tenth Circuit disciplinary panel erred by refusing to permit him to litigate this issue in the disciplinary proceedings it brought against him. As the result of this refusal, Mr. Smith was reduced to

87 S.Ct. 1824, 1831-32, 18 L.Ed.2d 1210 (1967); United States v. Ryan, 402 U.S. 530, 532, 91 S.Ct. 1580, 1582, 29 L.Ed.2d 85 (1971). Mr. Smith was also entitled to effective review of the validity of the disciplinary sanctions imposed against him by the Tenth Circuit disciplinary panel. See Honda Motor Co., Ltd. v. Oberg, 512 U.S. 415, 114 S.Ct. 2331, 129 L.Ed.2d 336 (1994). By arbitrarily refusing to provide effective review of the validity of the Tenth Circuit disciplinary panel's (November 29, 1993) suspension order before convicting and punishing Mr. Smith for allegedly violating this order, and by arbitrarily refusing to provide effective review of the validity of the disciplinary sanctions imposed against him by the Tenth Circuit disciplinary panel, the Tenth Circuit deprived him of his Fifth Amendment right to due process of law.

In order to convict and punish Mr. Smith for allegedly violating its (November 29, 1993) suspension order and practicing law in the Tenth Circuit "without authorization," the Tenth Circuit disciplinary panel was required

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begging for mercy from the consequences of the Tenth Circuit's transparently invalid orders.

to prove beyond a reasonable doubt that Mr. Smith entered his appearance on behalf of his clients in the appeals in question or otherwise held himself out as an attorney entitled to practice law in the Tenth Circuit. In two of the appeals in question, Mr. Smith's clients entered their appearances as pro se plaintiffs-appellants and filed briefs which included notes disclosing the fact that their briefs had been prepared with the assistance of their attorney, David L. Smith.[3] In the other two appeals in question, Mr. Smith's clients entered their appearances as pro se plaintiffs-appellants, but because of Mr. Smith's personal stake in the issues being appealed, he also entered his appearance in these appeals as a pro se attorney-appellant.[4] Mr. Smith and his clients

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[3]This disclosure was made in order to be completely above board and to avoid any possibility that Mr. Smith could or would be charged with "ghost-writing" his clients' briefs.

[4]Mr. Smith was still the attorney of record for the plaintiffs-appellants in their federal civil rights cases in the United States District Court for the District of Colorado, and he had a moral, ethical and contractual obligation to assist them with their appeals to the Tenth Circuit of the case stays, jury

filed joint briefs in these appeals. However, in none of the appeals in question did Mr. Smith enter his appearance on behalf of his clients or otherwise hold himself out as an attorney entitled to practice law in the Tenth Circuit. In the absence of proof beyond a reasonable doubt that he did, Mr. Smith should not have been convicted for violating the Tenth Circuit disciplinary panel's (November 29, 1993) suspension order and practicing law in the Tenth Circuit "without authorization." By ignoring these and the other defenses raised by Mr. Smith in his response to its order to show cause, the Tenth Circuit disciplinary panel deprived him of his Fifth Amendment due process right to present a defense to the charges being brought against him. See Cooke v. United States, 267 U.S. 517, 534, 45 S.Ct. 390, 394, 69 L.Ed. 767 (1925).

Upon information and belief, no other attorney has ever been prosecuted, tried, convicted or punished, much less disbarred, by the Tenth Circuit disciplinary panel for the type of

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trial cancellations, counsel removals, monetary sanctions and other harsh and unjustified punitive actions taken against him and them by the District Court.

misconduct (if any) involved in this case. The discipline imposed against Mr. Smith by the Tenth Circuit disciplinary panel is so excessive and so disproportionate in comparison to the seriousness of any misconduct committed by him as to amount to Eighth Amendment "cruel and unusual" punishment. See Solem v. Helm, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983); see also Browning-Ferris Industries v. Kelco, 429 U.S. 257, 109 S.Ct. 2909, 2923-34, 106 L.Ed.2d 219 (1989) (O'Connor, J., and Stevens, J., concurring in part and dissenting in part). Further, by disciplining Mr. Smith for writing briefs and otherwise assisting his clients with their appeals from the District Court to the Tenth Circuit, the Tenth Circuit disciplinary panel punished him for engaging in activities protected by his and his clients' First Amendment right to freedom of speech and association, and to petition the government for a redress of grievances. See, e.g., NAACP v. Button, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963) ("[a]nd under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances"); Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1, 84 S.Ct. 1113, 12 L.Ed.2d 89 (1964); United Mine Workers v. Illinois, 389 U.S. 217, 88 S.Ct. 353, 19 L.Ed.2d 426 (1967);

United Transportation Union v. State Bar of Michigan, 401 U.S. 576, 91 S.Ct. 1076, 28 L.Ed.2d 339 (1971); California Motor Transport Co. v. Trucking Unltd., 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972); Bill Johnson's Restaurants v. NLRB, 461 U.S. 731, 103 S.Ct. 2161, 76 L.Ed.2d 277 (1983); Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 104 S.Ct. 2803, 81 L.Ed.2d 732 (1984); Talamini v. Allstate Insurance Co., 470 U.S. 1067 (1985); Crumpacker v. Indiana Supreme Court Disciplinary Commission, 470 U.S. 1074 (1985); Silver v. Cormier, 529 F.2d 161, 163 (10th Cir. 1976) ("[a] public official's threats to a citizen to withhold monies due and owing, should legal proceedings be instituted, burdens or chills constitutional rights of access to the courts"), citing Harbolt v. Alldredge, 464 F.2d 1243, 1244 (10th Cir.), cert. denied, 409 U.S. 1025, 93 S.Ct. 473, 34 L.Ed.2d 319 (1972) and Evans v. Moseley, 455 F.2d 1084, 1087 (10th Cir. 1972); Henriksen v. Bentley, 644 F.2d 852, 855 (10th Cir. 1981); Shaw v. Neece, 727 F.2d 947, 948 (10th Cir. 1984); McKay v. Hammock, 730 F.2d 1367, 1375 (10th Cir. 1984); Nordgren v. Milliken, 762 F.2d 851 (10th Cir. 1985); Ward v. Fort, 762 F.2d 856, 858 (10th Cir. 1985). This was especially true for Mr. Smith's clients, who were incompetent to proceed pro se, and were financially unable to hire substitute counsel to

replace Mr. Smith, who was pursuing their federal civil rights cases on a contingent fee basis before he was disbarred from the practice of law in the Tenth Circuit without being afforded a due process evidentiary hearing.

Mr. Smith appears to be the victim of the current "professionalism crusade," in which "heretical lawyers" who commit themselves to roles other than "officer of the court" are hunted down, brought before the Inquisition and burned at the stake, even though "officer of the court" is not the only legitimate, or even the most traditional, role to which lawyers may commit themselves. See Atkinson, A Dissenter's Commentary on the Professionalism Crusade, 74 TEX. L. REV. 259 (1995). As Mr. Smith sees it, his primary role is not to be "officer of the court." His primary role is to be a zealous advocate of his clients' civil rights interests within the bounds of the law. Because the Tenth Circuit disciplinary panel has convicted and punished Mr. Smith for fulfilling this ethical obligation to his clients, the misconduct proved against him (if any) warrants that a substantially different form of discipline (including no discipline) be imposed.

By issuing her (February 18, 1997) order denying Mr. Smith's petition for

writ of habeas corpus, and motion to vacate, set aside or correct sentence without granting a hearing or considering the issues raised and argued by him therein, Chief Tenth Circuit Judge Seymour has deprived him of his Fifth Amendment due process right to a full and fair opportunity (or any opportunity) to litigate the constitutional validity of the Tenth Circuit disciplinary panel's (November 29, 1993) suspension order and its (February 13, 1996) order of disbarment. See 28 U.S.C. §§ 2241 and 2255; Hill v. United States, 368 U.S. 424, 82 S.Ct. 468, 7 L.Ed.2d 417 (1962); Kaufman v. United States, 394 U.S. 217, 89 S.Ct. 1068, 22 L.Ed.2d 227 (1969); Stone v. Powell, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976); United States v. Addonizio, 442 U.S. 178, 99 S.Ct. 2235, 60 L.Ed.2d 805 (1979); Lonchar v. Thomas, ____ U.S. ____, 116 S.Ct. 1293, ____ L.Ed.2d ____ (1996). Further, by issuing their (May 8, 1997) order denying Mr. Smith's petition for writ of mandamus or prohibition with respect to the letter refusal by the Clerk and Chief Deputy Clerk of the Tenth Circuit to accept for filing his notice of appeal of Chief Tenth Circuit Judge Seymour's (February 18, 1997) order without considering the issues raised and argued by him therein, Tenth Circuit Judges Ebel and Briscoe have deprived him of his statutory right to appeal this

order to the Tenth Circuit. See 28 U.S.C. § 2253. Under these circumstances, the judges of the Tenth Circuit have not only demonstrated further their bias and prejudice against Mr. Smith, in violation of his Fifth Amendment due process right to a fair and impartial decisionmaker; they have suspended the privilege of the Writ of Habeas Corpus, in violation of Article I, Section 9 of the Constitution of the United States.

By issuing its (February 10, 1995) suspension order, its (April 26, 1996) order of disbarment, and its (May 2, 1996) order admonishing Mr. Smith and threatening to cite him for contempt of court "if he continues to practice law in this District,"[5] and by imposing harsh and unjustified disciplinary sanctions against him without granting his requests for an evidentiary hearing, the judges of the District Court disciplinary panel have rubber-stamped the unlawful orders, judgments and proceedings of the Tenth Circuit and its disciplinary panel, in violation of his Fifth Amendment right to due process of law. See In re Ruffalo,

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[5]Mr. Smith denies that he practiced law in the District Court in violation of the District Court disciplinary panel's (February 10, 1995) suspension order.

390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968). The judges of the District Court disciplinary panel have also engaged in a pattern of judicial misconduct, in violation of Canon 3 of the ABA Code of Judicial Conduct and 28 U.S.C. § 372(c).

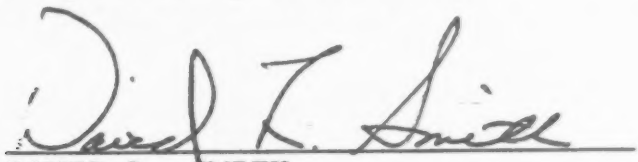
By issuing its (May 16, 1997) order denying Mr. Smith's appeal of the District Court disciplinary panel's (April 26, 1996) order of disbarment and its (May 2, 1996) order admonishing Mr. Smith and threatening to cite him for contempt of court "if he continues to practice law in this District" without considering the issues raised and argued by him in his appellate brief, and by issuing its (June 13, 1997) order denying Mr. Smith's petition for rehearing and suggestion for rehearing en banc of its (May 16, 1997) order, and denying his complaint of judicial misconduct, without considering the issues raised and argued by him therein, the judges of the Tenth Circuit have deprived Mr. Smith of his First Amendment right to petition the government for a redress of grievances and his Fifth Amendment right to due process of law, including his statutory right to appeal a final decision of a district court. See 28 U.S.C. § 1291; see also Honda Motor Co., Ltd. v. Oberg, 512 U.S. 415, 114 S.Ct. 2331, 129 L.Ed.2d 336 (1994). The judges of the Tenth

Circuit have also engaged in a pattern of judicial misconduct, in violation of Canon 3 of the ABA Code of Judicial Conduct and 28 U.S.C. § 372(c).

Under these circumstances, it is clear that the Tenth Circuit and its disciplinary panel have so far departed from the accepted and usual course of judicial proceedings, or have sanctioned such a departure by the District Court and its disciplinary panel, as to call for an exercise of this Court's supervisory power. It is also clear that the Tenth Circuit, the District Court and their disciplinary panels have decided important questions of federal law that have not been, but should be, settled by this Court. Finally, it is clear that the Tenth Circuit, the District Court and their disciplinary panels have decided important federal questions in a way that conflicts with relevant decisions in this Court. For these reasons, Mr. Smith requests this Court to grant his petition for writ of certiorari, and such other and further relief as may be just under the circumstances, including an order reversing and declaring void ab initio the Tenth Circuit disciplinary panel's (November 29, 1993) suspension order, its (February 13, 1996) order of disbarment, the District Court disciplinary panel's (February 10, 1995) suspension order, its (April 26, 1996) order of disbarment, and

its (May 2, 1996) order admonishing Mr. Smith and threatening to cite him for contempt of court "if he continues to practice law in this District."

Respectfully submitted,



DAVID L. SMITH

1630 Welton Street, Suite 300
Denver, Colorado 80202
(303) 534-0153

PRO SE ATTORNEY-PETITIONER

APPENDIX

In re David L. Smith, 10 F.3d 723 (10th Circuit Disciplinary Panel) (Suspension Order Filed on November 29, 1993), cert. denied, 513 U.S. 807, 115 S.Ct. 53, 130 L.Ed.2d 13 (1994) A-4

IN THE MATTER OF DAVID L. SMITH, Disciplinary Action No. 93-DP-28 (District of Colorado Disciplinary Panel) (Suspension Order Filed on February 10, 1995) A-7

In re David L. Smith, 76 F.3d 335 (10th Circuit Disciplinary Panel) (Order of Disbarment Filed on February 13, 1996), cert. denied, ____ U.S. ____, 117 S.Ct. 186, ____ L.Ed.2d ____ (1996) A-9

IN THE MATTER OF DAVID L. SMITH, Nos. 95-1091 and 95-1119 (10th Circuit) (Order and Judgment Filed on February 16, 1996) A-13

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United States Court of Appeals
for the Tenth Circuit

In re:	)	
	)	No. 93-631
David L. Smith	)	

Order
Filed November 29, 1993

Before Seymour, Chief Judge, Baldock and Brorby, Circuit Judges

Respondent was ordered to show cause why he should not be fined, disbarred or otherwise disciplined for filing frivolous appeals in numbers 93-1070 and 93-1139, DeHerrera v. Denver, after the entry of this court's orders in Sandlin v. Canady (In re Canady), No. 92-1169 (10th Cir. April 27, 1993) and Dunkin v. Louisiana-Pacific Corp., Nos. 92-1230 & 92-1381 (10th Cir. February 11, 1993), cert. denied, 114 S.Ct. 87 (October 4, 1993)(No. 92-1994) and for filing a frivolous appeal in Casillan v. Regional Transportation District, Nos. 92-1009 & 92-1039 (10th Cir. January 15, 1993). Respondent maintains the appeals were not frivolous. We disagree.

The appeals were found to be frivolous by the panels who decided them. We cannot overrule the judgment of another panel of this court. We are

bound by the precedent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court. United States v. Killion, No. 92-3130, 1993 WL 408150 (10th Cir. October 13, 1993); United States v. Spedalieri, 910 F.2d 707, 710 n. 3 (10th Cir. 1990) (a three-judge panel cannot overrule circuit precedent); United States v. Berryhill, 880 F.2d 275, 277 (10th Cir. 1989), cert. denied, 493 U.S. 1049 (1990).

Respondent filed a petition for certiorari in Dunkin. The question presented for review was,

> "Whether an order sanctioning counsel currently of record is immediately appealable under the collateral order exception rule established by this Court in Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949).
>
> Whether sanctions may be imposed against counsel for filing appeals warranted by existing law or by a good faith argument for the extension, modification or reversal of existing law."

Petition for certiorari, attached to appellant's motion to recall and stay the

mandate filed July 12, 1993, in Dunkin v. Louisiana-Pacific Corp., Nos. 92-1230 & 92-1381 (10th Cir. February 11, 1993). Certiorari was denied without comment. Dunkin and Smith v. Louisiana-Pacific Corp., ____ U.S. ____, 114 S.Ct. 87 (October 4, 1993)(No. 92-1994).

At oral argument, respondent admitted that he has not paid any of the sanctions that have been imposed on him by this court or the district court. David L. Smith is suspended from the practice of law before this court until all sanctions are paid. He may apply for reinstatement to our bar when he can demonstrate that each sanction order of this court or the district court has been satisfied.

The clerk shall provide a copy of this order to all courts before which Mr. Smith has been admitted to practice.

Entered for the Court
Per Curiam

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Disciplinary Action No. 93-DP-28

IN THE MATTER OF DAVID L. SMITH

DISCIPLINARY ORDER
Filed Februay 10, 1995

On February 2, 1995, this matter was heard before the Disciplinary Panel of this Court. After hearing arguments and statements of counsel, reviewing all transcripts, exhibits and other documents in this matter, and considering carefully the issues, it is

ORDERED that identical discipline will be imposed by the United States District Court as was imposed by the United States Court of Appeals for the Tenth Circuit. It is

FURTHER ORDERED that David L. Smith is suspended as a member of the Bar of this Court. It is

FURTHER ORDERED that when the United States Court of Appeals for the Tenth Circuit lifts its suspension of Mr. Smith, he shall be required to apply for reinstatement in accordance with D.C.COLO.LR 83.6N. of the Local Rules of Practice of this court. It is

FURTHER ORDERED that David L. Smith shall forward his certificate of admission to the Clerk of the Court within ten days from the date of this order and that he shall in no way hold himself out as an attorney admitted to practice in this court be it by use of letterhead, business cards, advertisement or any other manner.

Dated at Denver, Colorado this 10th day of February, 1995.

BY THE DISCIPLINARY PANEL OF THE COURT

Zita L. Weinshienk, Judge

Edward W. Nottingham, Judge

Daniel B. Sparr, Judge

United States Court of Appeals
for the Tenth Circuit

In re:	)	
	)	No. 93-631
David L. Smith	)	

Order
Filed February 13, 1996

Before Seymour, Chief Judge, Baldock and Brorby, Circuit Judges

On December 14, 1995, this panel entered an order requiring respondent David L. Smith to show cause why he should not be disbarred for violating this court's November 1993 suspension order and for practicing in this court without authorization. On December 20, Mr. Smith filed his response. In ruling in this matter, the court has carefully reviewed that response, as well as the other pleadings filed to date in this disciplinary action. The court has determined that Mr. Smith's transgressions warrant disbarment.

Mr. Smith's name was referred for attorney discipline after more than one panel of this court determined he was filing frivolous appeals and failing to pay court ordered sanctions. Following

briefing and oral argument, this panel suspended Mr. Smith from practicing in the Tenth Circuit. In re Smith, 10 F.3d 723 (10th Cir. 1993)(per curiam), cert. denied, 115 S.Ct. 53 (1994). Approximately one year later, Mr. Smith filed a request for reinstatement. This panel denied that request. See Order Denying Reinstatement, No. 93-631, (10th Cir. July 18, 1995).

During the course of his suspension, Mr. Smith continued to file briefs in this court. In particular, the court has identified four appeals in which Mr. Smith appears to have drafted briefs on behalf of the allegedly pro se appellants. Those appeals are 94-1127, Qualls v. Regional Transportation District, 94-1130, Dunkin v. Louisiana-Pacific Corporation, 94-1317, Howard v. Mail-Well Envelope Company, and 95-1198, Seales v. Jefferson County School District R-1. The December 14 show cause order was the culmination of this court's efforts to have Mr. Smith explain his involvement in these appeals.

In his response, Mr. Smith readily admits, as he has before, that he wrote and submitted the briefs in this court following the issuance of our suspension order. He maintains, however, that those submissions are not in violation of this

court's order because he signed two of the briefs in question and included footnotes admitting his involvement in the other two. He suggests that these admissions absolve him of any allegations of "ghost-writing." See Johnson v. Board of County Commrs., 868 F. Supp. 1226, 1231-32 (D. Colo. 1994)(discussing elements of ghost-writing). The argument follows that because he admits his assistance, he cannot be subject to discipline. Mr. Smith's arguments misperceive the nature of the problem.

Mr. Smith was advised, in very clear terms, that he no longer had permission to practice law in this court. He was told he could not act as an attorney for his clients or former clients. In writing and filing briefs on behalf of otherwise pro se litigants, he violated that order. This breach existed regardless of whether he signed the briefs or inserted footnotes. Following the suspension order, Mr. Smith was prohibited from helping his clients with their briefs.

Contrary to assertions made in the response, the court has been very careful to distinguish between efforts made on behalf of clients and Mr. Smith's right to appeal sanctions issues on his own behalf. The briefs in the four cases

identified asked for relief which went far beyond Mr. Smith as an individual. In 94-1127, for example, the alleged "pro se" brief requests relief in the form of reversing the district court's dismissal of certain claims and remand for an expedited jury trial on the merits. The front cover of that brief asserts it is being submitted by Mr. Qualls, not David Smith. We find it disingenuous for Mr. Smith to urge that these briefs only contained arguments personal to him.

Despite repeated warnings, Mr. Smith has chosen not to heed the orders of this court. He is, therefore, disbarred. His name will be stricken from the list of attorneys allowed to practice in this court. In addition, in accordance with Fed. R. App. P. 35(b), Mr. Smith's suggestion for hearing en banc was circulated to all judges of the court in regular active service. No member of the panel or the court has requested a poll. Therefore, the suggestion for en banc hearing is denied. The request for evidentiary hearing is likewise denied. Mr. Smith is referred to the office of the Circuit Executive to file any desired judicial misconduct complaint.

Entered for the Court

Per Curiam

United States Court of Appeals
for the Tenth Circuit

IN THE MATTER OF	)	Nos. 95-1091 &
DAVID L. SMITH,	)	95-1119
	)	(D.C. No. 93-DP-28)
Attorney-Appellant.	)	(D. Colo.)

ORDER AND JUDGMENT[6]
Filed February 16, 1996

Before Tacha, Logan, and Kelly, Circuit Judges

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

[6]This order and judgment is not binding precedent, except under the doctrine of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

This appeal is from an order of the three-judge disciplinary panel of the United States District Court for the District of Colorado. Appellant Smith appeals pro se on numerous grounds relating to his suspension from the practice of law before this court and before the United States District Court for the District of Colorado. Appellant raises numerous grounds for his appeal relating to the application of local rules of the district court, the denial of due process in the procedures of that court and this court, and various allegations relating to the proceedings that resulted in suspension from the practice of law before the district court and this court.

This disciplinary matter has a long history in this court and in the district court. In November of 1993, a three-judge disciplinary panel of this court issued an order suspending appellant from the practice of law before the Tenth Circuit. In re Smith, 10 F.3d 723 (10th Cir. 1993) (per curiam), cert. denied, 115 S.Ct. 53 (1994). Following his suspension before the Tenth Circuit, the United States District Court for the District of Colorado conducted hearings, took evidence, and reviewed records related to the actions underlying the disciplinary proceedings. The arguments

that Mr. Smith makes again on appeal are, in large measure, a renewed effort to bring before this court matters that were determined previously in the original disciplinary proceeding. Appellant further alleges on appeal that various district court judges from the United States District Court in Colorado have imposed unjust and harsh sanctions against him. Finally, appellant urges that his counsel Mr. Figa, who has withdrawn from the case, failed to represent appellant competently in connection with all of the disciplinary actions. We find no merit in any of the arguments made on appeal. We approve the disciplinary order issued by the district court for substantially the reasons given in its post-hearing order. This court recently disbarred Mr. Smith for his failure to abide by previously entered orders. In re Smith, No. 93-631 (10th Cir. Feb. 13, 1996) (per curiam). Continued attempts by this appellant to further litigate matters already determined by this court or foreclosed by previous determinations could result in the imposition of sanctions. AFFIRMED.

The mandate shall issue forthwith.

ENTERED FOR THE COURT

Deanell Reece Tacha
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Disciplinary Action No. 96-DP-4

IN THE MATTER OF THE DISBARMENT OF
DAVID L. SMITH

ORDER OF DISBARMENT
Filed April 26, 1996

It appears that on February 13, 1996, the United States Court of Appeals for the Tenth Circuit disbarred DAVID L. SMITH from the practice of law in that Court effective February 13, 1996; it further appears that DAVID L. SMITH was admitted as a member of the Bar of the United States District Court for the District of Colorado on February 11, 1977 and that a Disciplinary Order entered in this Court on February 10, 1995 suspending DAVID L. SMITH. It further appears that on March 18, 1996, DAVID L. SMITH was notified by the Committee on Conduct by certified mail, return receipt, at his most current address on file with the Clerk of the Court of these proceedings. Pursuant to D.C.COLO.LR 83.6)., simultaneous and identical discipline will be imposed by the United States District Court for the District of Colorado nunc pro tunc from the date of judgment of the United States Court of

Appeals for the Tenth Circuit. DAVID L. SMITH was given ten (10) days to file an answer should he desire to oppose or contest said recommendation. It further appears that on March 20, 1996 DAVID L. SMITH filed an opposition to simultaneous and identical discipline. The Committee on Conduct has considered the response and recommends disbarment. The Court accepts the recommendation and it is therefore

ORDERED that pursuant to the Local Rules of Practice of this Court, DAVID L. SMITH is disbarred from the practice of law in this Court and his name shall be stricken from the roll of attorneys licensed to practice law in this Court. It is further

ORDERED that DAVID L. SMITH shall forward his certificate of admission to the Clerk of the Court within ten days from the date of this Order and that he shall in no way hold himself out as an attorney admitted to practice in this Court be it by use of letterhead, business cards, advertisement or in any other manner.

Dated at Denver, Colorado, this 26th day of April, 1996.

BY THE DISCIPLINARY PANEL OF
THE COURT

ZITA L. WEINSHIENK, Judge

EDWARD W. NOTTINGHAM, Judge

DANIEL B. SPARR, Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Disciplinary Action No. 95-CC-5

IN THE MATTER OF DAVID L. SMITH

ORDER
Filed May 2, 1996

The Disciplinary Panel of the United States District Court for the District of Colorado (Disciplinary Panel) has considered the recommendation of the Committee on Conduct that the Disciplinary Panel issue an order to show cause why David L. Smith should not be held in contempt of the Court for practicing law in the United States District Court for the District of Colorado.

Mr. Smith was suspended from practicing law in this District on February 10, 1995. On April 26, 1996, Mr. Smith was disbarred in this District.

At this time the Disciplinary Panel declines to issue an order to show cause. Mr. Smith is strongly admonished that he shall not practice law in this District whether in a case filed in the Court or removed from state to federal court, and

that if he continues to practice law in this District, he may be cited for contempt of Court in an appropriate proceeding.

Dated at Denver, Colorado, this 2nd day of May, 1996.

BY THE DISCIPLINARY PANEL OF THE COURT

ZITA L. WEINSHIENK, Judge

EDWARD W. NOTTINGHAM, Judge

DANIEL B. SPARR, Judge

United States Court of Appeals
for the Tenth Circuit

In re:	)	
	)	No. 93-631
David L. Smith	)	
	)	

Order
Filed February 18, 1997

Before SEYMOUR, Chief Judge

Petitioner David L. Smith's petition for writ of habeas corpus, motion to set aside or correct sentence, and motion for stay of state court proceedings are all denied.

Entered for the Court

PATRICK FISHER,
Clerk of Court

By:
Elisabeth A. Shumaker
Chief Deputy Clerk

United States Court of Appeals
for the Tenth Circuit

In re:	)	
	)	No. 97-1121
David L. Smith	)	

Order
Filed May 8, 1997

Before Ebel and Briscoe, Circuit Judges

This matter is before us for consideration of a petition for a writ of mandamus or prohibition and a motion for stay of certain state court proceedings pending appeal.

Following this court's suspension and subsequent disbarment of petitioner

from practicing law before this court,[7] petitioner filed within the disbarment case, No. 93-631,[8] a document styled "Petition for A Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241; Motion to Vacate, Set Aside or Correct Sentence Pursuant to 28 U.S.C. § 2255; and Motion for A Stay of State Court Proceedings Pursuant to 28 U.S.C. § 2251."[9]

The habeas petition was addressed to Chief Judge Seymour. Although most of

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[7] In re Smith, 10 F.3d 723 (1993) (per curiam), cert. denied, 513 U.S. 807 (1994); In re Smith, 76 F.3d 335 (10th Cir.), cert. denied, 117 S.Ct. 186 (1996).

[8] Petitioner used the same case number, No. 93-631, but altered the caption to read "Smith v. United States Court of Appeals," etc. In denying the petition for writ of habeas corpus, this court has adhered to the correct caption, "In re Smith."

[9] Petitioner cites no basis whatever for this court's jurisdiction under these statutes. There is no indication that he is in custody for purposes of any of the referenced provisions, nor is he challenging a sentence under 28 U.S.C. § 2255.

the petition was devoted to petitioner's continuing arguments that he had been wrongfully disbarred, the relief expressly sought by the habeas petition was a stay of disciplinary proceedings pending before the Colorado Supreme Court. The stay was necessary, according to petitioner, to enable the chief judge "to grant an effective remedy in this habeas corpus proceeding."

The habeas petition was denied initially by Chief Judge Seymour and on rehearing[10] by a panel of this court. Petitioner then tendered another document titled simply "Notice of Appeal," seeking yet <u>further</u> review of the denial of his petition for writ of habeas corpus. At that point, the court declined to accept additional pleadings in case No. 93-631 and advised Mr. Smith that further attempted filings would be discarded without further notice.

Mr. Smith then filed this petition seeking an order directing the clerk to file his second notice of appeal,

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[10] Following the initial denial, petitioner filed a document styled "Notice of Appeal, Petition for Rehearing and Motion for a Stay of State Court Proceedings."

claiming that he is "entitled to appeal Chief Judge Seymour's final order or judgment denying his petition for a writ of habeas corpus and his motion to vacate, set aside or correct sentence to the United States Court of Appeals for the Tenth Circuit."

For mandamus to issue, there must be a clear right to the relief sought, a plainly defined and peremptory duty on the part of respondent to do the action in question, and no other adequate remedy available. Hadley Memorial Hosp., Inc. v. Schweiker, 689 F.2d 905, 912 (10th Cir. 1982). Petitioner must also show that his right to the writ is "clear and indisputable." Mallard v. United States Dist. Court of the S. Dist. of Iowa, 490 U.S. 296, 309 (1989); Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33, 35-36 (1980); In re Weston, 18 F.3d 860, 864 (10th Cir. 1994).

Here, petitioner's first notice of appeal, filed February 26, 1997, was considered as a petition for rehearing and denied. This comports with the requirements of Fed. R. App. P. 27© (action of single judge may be reviewed by court). Petitioner is not entitled, simply because he dislikes the result, to continue litigating a case which has been

conclusively decided by this court and by filing additional notices of appeal.

Case No. 93-631 is closed. Nothing remains to be appealed. "[T]he right of access to the courts is neither absolute nor unconditional, and there is no constitutional right of access to the courts to prosecute an action that is frivolous or malicious." In re Winslow, 17 F.3d 314, 315 (10th Cir. 1994), quoting Tripati v. Beaman, 878 F.2d 351, 353 (10th Cir. 1989). The same holds for continued attempts to litigate a case that is closed.

The petition for writ of mandamus is denied. In view of our disposition of the mandamus petition, the motion for stay is also denied.

Entered for the Court
PATRICK FISHER, Clerk

By
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

IN THE MATTER OF	)	
DAVID L. SMITH,	)	Nos. 96-1254 &
	)	96-1256
Attorney-Appellant.	)	(D.C. Nos. 96-DP-4
	)	& 95-CC-5)
	)	(D. Colo.)

ORDER AND JUDGMENT[11]
File on May 16, 1997

Before BRORBY, EBEL AND KELLY, Circuit Judges

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the

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[11]This order and judgment is not binding precedent except under the doctrines of law of the case, res judicata and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

In No. 96-1254, Mr. David L. Smith appeals the district court's order of April 26, 1996, disbarring him from the practice of law in the United States District Court for the District of Colorado. In No. 96-1256, Mr. Smith appeals the district court's Order of May 2, 1996, declining to issue a show cause directive to him.

No. 96-1254

On February 13, 1996, this court disbarred Mr. Smith from the practice of law in this circuit. In re Smith, 76 F.3d 335 (10th Cir), cert. denied, 117 S.Ct. 186 (1996). Thereafter, on March 18, 1996, the United States District Court for the District of Colorado advised Mr. Smith he was subject to "simultaneous and identical discipline" pursuant to Dist. Ct. of Colo., Local R. 83.6P. The district court further advised Mr. Smith he had ten days in which to show cause in writing why simultaneous discipline should not have been imposed.

On March 20, 1996, Mr. Smith submitted an eight-page response to the district court's notice of disbarment. After considering Mr. Smith's response and this Court's disbarment order, the district court disbarred Mr. Smith from the practice of law in the United States District Court for the District of Colorado on April 26, 1996.

On appeal, Mr. Smith contends Dist. Ct. of Colo. Local R. 83.6P is unconstitutional as applied to him because it fails to provide an adequate opportunity to be heard prior to entry of a final judgment. In support of his contention, he argues he could not adequately respond in writing within the ten days prescribed by the local rule; therefore, he was entitled to an evidentiary hearing on the issues and the district court disbarred him on the basis of the recommendation of the District Court Committee on Conduct without affording him the opportunity to respond to the recommendation. Finally, Mr. Smith asserts the district court failed to make adequate findings of fact and conclusions of law in its final judgment. Because Mr. Smith's contentions raise questions of law, we apply a de novo review.

"It is clear that federal courts must afford attorneys some due process rights before suspending or disbarring them." Mattox v. Disciplinary Panel of U.S. Dist. Court for the Dist. of Colo., 758 F.2d 1362, 1365 (10th Cir. 1985). It is equally clear due process requires "notice reasonably calculated to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." In re Barton Indus., Inc., 104 F.3d 1241, 1245 (10th Cir. 1997) (quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)). See also In re Jones, 506 F.2d 527, 528 (8th Cir. 1974) (due process in disbarment case).

In this case, the Letter from the Committee on Conduct clearly provided Mr. Smith with notice of his pending disbarment. The letter also apprised Mr. Smith of the opportunity to present written objections. An opportunity of which Mr. Smith took full advantage. Therefore, we hold the district court provided Mr. Smith with due process in this case. He was not entitled to an evidentiary hearing or a second opportunity to respond to the recommendation of the Committee on Conduct.

Mr. Smith's argument the district

court failed to make adequate findings of fact and conclusions of law in its final judgment is without merit. The district court's order specifically accepts the recommendation of the Committee on Conduct as the factual and legal basis of its decision. In this case, this establishes adequate factual and legal grounds for the court's decision.

No. 96-1256

On May 2, 1996, the district court declined the recommendation of the Committee on Conduct to issue a show-cause order directing Mr. Smith to show cause why he should not be held in contempt of court for practicing law in the United States District Court for the District of Colorado while under suspension. In addition, the district court admonished Mr. Smith not to practice law in the district and stated that if he continues to do so he may be subject to contempt proceedings.

Mr. Smith now appeals the district court's decision not to issue a show cause order on his arguing the district court admonished and threatened him without giving him the opportunity to respond, thus violating his due process rights. However, Mr. Smith has failed to establish we have jurisdiction to consider this appeal.

Specifically, Mr. Smith has failed to establish any injury in fact, either actual or threatened, as a result of the district court's order, that would establish his standing to challenge the district court's action and, thus, our jurisdiction. See Powder River Basin Resource Council v. Babbitt, 54 F.3d 1477, 1484-85 (10th Cir. 1995) (appellate court lacks jurisdiction when appellant loses standing because it no longer had an injury in fact or an invasion of a legally protected interest on appeal). The district court's admonishment and reminder of the consequences for failing to abide by his disbarment can in no way be considered injurious. Therefore, Mr. Smith lacks standing and we lack jurisdiction. See id.

Additionally, were we to consider Mr. Smith's claims, we would hold they are wholly without merit. He was given ample opportunity to respond.

Accordingly, in No. 96-1254, we AFFIRM the district court's Order of April 26, 1996, disbarring Mr. Smith from the practice of law in the United States District Court for the District of Colorado. In No. 96-1256, we DISMISS Mr. Smith's appeal of the district court's May 2, 1996 order for lack of jurisdiction.

Entered for the Court

WADE BRORBY
United States Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

IN THE MATTER OF	)	
DAVID L. SMITH,	)	Nos. 96-1254
	)	96-1256
Attorney-Appellant.	)	

ORDER
Entered June 13, 1997

Before BRORBY, EBEL and KELLY, Circuit Judges.

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing en banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in

regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Appellant's motion for stay is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

By:
Deputy Clerk

Article I, Section 9 of the Constitution of the United States provides in pertinent part as follows:

> The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

Amendment I of the Constitution of the United States provides in pertinent part as follows:

> Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people . . . to petition the Government for a redress of grievances.

Amendment V of the Constitution of the United States provides in pertinent part as follows:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

Amendment VI of the Constitution of the United States provides as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment VIII of the Constitution of the United States provides as follows:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

28 U.S.C. § 372(c) provides in pertinent part as follows:

> Any person alleging that a circuit, district, or bankruptcy judge, or a magistrate, has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts, or alleging that such a judge or magistrate is unable to discharge all the duties of office by reason of mental or physical disability, may file with the clerk of the court of appeals for the circuit a written complaint containing a brief statement of the facts constituting such conduct. In the interests of the effective and expeditious administration of the business of the courts and on the basis of information available to the chief judge of the circuit, the chief judge may, by written order stating reasons therefor, identify a complaint for purposes of this subsection and thereby dispense with the filing of a written complaint.

28 U.S.C. § 455(a) provides as follows:

> Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

28 U.S.C. § 1291 provides as follows:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. § 2241 provides as follows:

> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.
>
> (b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.
>
> (c) The writ of habeas corpus shall not extend to a prisoner unless--
>
> > (1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or
> >
> > (2) He is in custody for an act done or omitted in

pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more

Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

28 U.S.C. § 2253 provides as follows:

> In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had.
>
> There shall be no right of appeal from such an order in a proceeding to test the validity of a warrant to remove, to another district or place for commitment or trial, a person charged with a criminal offense against the United States, or to test the validity of his detention pending removal proceedings.
>
> An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a State court, unless the justice or judge issues a certificate of probable cause.

28 U.S.C. § 2255 provides as follows:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> A motion for such relief may be made at any time.
>
> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence

imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be

entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

Fed. R. App. P. 46 provides in pertinent part as follows:

. . .

(b) Suspension or Disbarment.--When it is shown to the court that any member of its bar has been suspended or disbarred from practice in any other court of record, or has been guilty of conduct unbecoming a member of the bar of the court, the member will be subject to suspension or disbarment by the court. The member shall be afforded an opportunity to show good cause, within such time as the court shall prescribe, why the member should not be suspended or disbarred. Upon the member's response to the rule to show cause, and after hearing, if requested, or upon expiration of the time prescribed for a response if no response is made, the court shall enter an appropriate order.

(c) Disciplinary Power of the Court Over Attorneys.--A court of appeals may, after reasonable notice and an opportunity to show cause to the contrary, and after hearing, if requested, take any appropriate disciplinary action against any attorney who practices before it for

conduct unbecoming a member of the bar or for failure to comply with these rules or any rule of the court.

10th Circuit Rule 36.3 provides as follows:

> Unpublished opinions and orders and judgments of this court have no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel.

Section 8.1 of the Plan for Attorney Disciplinary Enforcement for the United States Court of Appeals for the Tenth Circuit provides as follows:

> If an attorney's response to an order to show cause specifically requests to be heard in defense or in mitigation, the disciplinary panel may set the matter for a hearing before a special master. If an evidentiary hearing is held before a special master, findings of fact must be promptly prepared and forwarded to the disciplinary panel and the attorney. Exceptions to the special master's findings may be filed within ten (10) days of the date the findings are transmitted by the special master to the disciplinary panel. After the disciplinary panel has resolved any timely exceptions, it may then make a decision.

Canon 3 of the ABA Code of Judicial Conduct provides in relevant part as follows:

. . .

> A judge should accord to every person who is legally interested in a proceeding, or his or her lawyer, full right to be heard according to law . . . .
>
> . . .
>
> A judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned . . . .